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No. 116

IN THE

Supreme Court of the United States

SAM HANNA FOGEL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI AND SUPPORTING BRIEF

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No.———

IN THE

Supreme Court of the United States

SAM HANNA FOGEL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Supreme Court of the United States:

Now comes Sam Hanna Fogel, hereinafter styled petitioner, and applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

STATEMENT OF THE CASE

On January 22nd, 1947, an indictment was returned to the District Court of the United States for the Northern District of Texas, Dallas Division, charging petitioner with having on or about February 16th, 1942, unlawfully, willfully, and feloniously, with intent to evade induction into the land or naval forces of the United States of America, fail and neglect to register with a Selective Service Draft Board, which said act and failure to act on the part of said defendant, as aforesaid, were in violation of the Act of Congress of the said United States, approved September 16, 1940, as amended, commonly cited as the Selective Training and Service Act of 1940, as amended, and the Rules, Orders and Regulations issued and promulgated by virtue of and in pursuance thereto, *and the petitioner being then and there such a person who was bounden under the provisions and requirements of said Act, Rules, Orders and Regulations to so register* as is required by the provisions of the said Act and the said Rules, Orders and regulations. (Tr. p. 1.)

Without the services of a jury, the cause was tried before the Court, and petitioner was on February 19th, 1947, convicted and sentenced to serve eighteen months in a United States Prison to be designated by the Attorney General, and to pay a fine of $1,000.00. From said judgment and sentence, petitioner seasonably appealed to the United

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States Circuit Court of Appeals for the Fifth Circuit, and on June 12, 1947, that court, in a divided opinion, affirmed the judgment and sentence of the Court below. (Fogel vs. United States, 162 F. (2) 54.)

In due course, petitioner applied to this Honorable Court for Writ of certiorari which was denied on the 20th day of October, 1947.

Prior to the service of commitment under the mandate of said Circuit Court of Appeals for the Fifth Circuit, petitioner filed in the District Court of the United States for the Northern District of Texas motion for new trial under Rule 33 of Federal Rules of Criminal Procedure for the District Courts of the United States, and prayed for stay of commitment pending hearing upon said motion. (Tr. pp. 2-5.) The Trial Court granted stay of commitment, heard the motion and testimony presented by petitioner in support thereof, and on November 14th, 1947, overruled same. (Tr. pp. 8-9.)

From said order overruling his motion for new trial, petitioner seasonably appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which said Circuit Court, again, *in a divided opinion*, affirmed the actions of the Court below, May 7, 1948. (Tr. pp. 249-258.) Petitioner filed his petition for rehearing May 21, 1948 (Tr. pp. 260-267), which again, *by a divided Court*, was overruled on May 28th, 1948, without written opinion. (Tr.

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p. 268.) The Circuit Court of Appeals issued its order June 7th, 1948, staying mandate for 30 days from May 28th, 1948, pending this petition for certiorari.

That this Honorable Court may be able to ascertain whether the evidence offered in his motion for new trial under Rule 33 of Federal Rules of Criminal Procedure for the District Courts of the United States is in fact newly discovered within the meaning of that rule, petitioner introduced into the record a transcript of all testimony offered at his original trial of his cause on its merits, which is here brought forward. (Tr. pp. 69-110.)

Evidence introduced at the trial on its merits was to the effect that petitioner was a Polish immigrant, or a Polish Jew, who emigrated to America in 1913, after his brother, Josef, had preceded him here. (Tr. p. 99.) They kept no birth certificates or record of births in the town or province from which petitioner came. He was confused about his age, and did not know exactly how old he was. (Tr. p. 81.) The Trial Court actually found, in its oral opinion, that petitioner was confused about how old he was. (Tr. p. 235.) The Government offered in evidence testimony of Glenn A. Torrence, naturalization examiner with the United States Immigration and Naturalization Service, that petitioner had stated to him, under oath, in connection with his registration as an alien and later in his application for naturalization as a citizen, that he was born July 10th, 1898. (Tr. pp. 72-74.)

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Mr. Glenn A. Torrence further testified that "*I found there is no record extant of his (petitioner's) entry into the United States.*" Further, in answer to the question "It is your testimony there is no such record?", Mr. Torrence answered: "*That is the information furnished us by his claimed port of entry — I think it is Philadelphia — they have no record there of his entry into the United States.*" (Tr. pp. 76-77.)

At the hearing upon his motion for new trial petitioner produced and introduced into evidence certified copy of the record of the entry of one Schloime Vogel (Tr. p. 31), showing his age to have been twenty on June 30th, 1913. This subject had the same father, mother, and brother as has petitioner. He was going to the home of Josef Vogel, 1613 South Orkney Street, Philadelphia, Pennsylvania, the home of petitioner's brother. Sam Hanna Fogel and Schloime Vogel are one and the same person. (Tr. p. 46), and (Tr. pp. 63-65.) Schloime Vogel is Yiddish for Sam Fogel. (Tr. pp. 46-49 and 63-65.)

Petitioner further produced and introduced into evidence at his hearing upon his motion for new trial, certified copy of his registration certificate for selective service for World War I (Tr. p. 223), showing his birth date as 1894, and that he was 23 years of age June 5th, 1917. Neither counsel here appearing represented petitioner at his original trial, but he was represented by Honorable

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Emil Corenbleth and others. (Tr. p. 70.) At the hearing upon his motion for new trial the Trial Court allowed petitioner's counsel to stipulate what the testimony of Mr. Corenbleth would be with reference to whether he knew of the certificate of entry of petitioner or the fact that there was in existance his registration certificate for selective service for World War I at the time of petitioner's original trial. (Tr. p. 234.) That testimony was that they knew nothing of the existence of either the record of petitioner's entry into the United States as was found in the Department of Immigration and Naturalization at Philadelphia, nor of the existence of the registration certificate of petitioner for selective service for World War I. (Tr. p. 234.)

Nowhere in the testimony had at his original trial is there any mention or intimation that petitioner had registered for selective service during World War I, and the Government offered positive proof that there was no record of his entry into the United States. (Tr. p. 76.) It was found and produced at the hearing upon his motion for new trial. (Tr. p. 31.) But the trial court said it was not newly discovered evidence (Tr. p. 237), and the Circuit Court of Appeals affirmed the trial court. (Tr. pp. 249-255.)

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STATEMENT AS TO JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended (28 U.S.C.A., Section 347-a). The opinion of the Circuit Court of Appeals for the Fifth Circiut was filed on May 7th, 1948. Petition for rehearing was filed in the said Circuit Court of Appeals on May 21st, 1948, and overruled on May 28th, 1948.

QUESTIONS PRESENTED

The only question presented in this petition, as petitioner views it, is whether the trial court abused its discretion in overruling his motion for new trial, based on newly discovered evidence, as permitted and allowed under and by Rule 33 of Federal Rules of Criminal Procedure for the District Courts of the United States. He assigned in the United States Circuit Court of Appeals for the Fifth Circuit, the following Assignment of Errors, which he here now urges, and says the United States Circuit Court of Appeals erred, in its majority opinion and judgment, in failing and refusing to sustain them:

ASSIGNMENTS OF ERRORS

The (trial) court abused its discretion in overruling appellant's (petitioner's) motion for a new trial, because:

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1

He "erroneously excluded from consideration matters which were appropriate to a decision on the motion." (United States vs. Socony Vacuum Oil Co., 310 U. S., 247, 84 L. Ed., 1181.)

2

The newly discovered evidence introduced at the hearing upon petitioner's motion for a new trial "is so material that it would probably produce a different result" at another trial. (Weiss vs. United States, 122 F. (2) 691, 5th Cir.)

3

The trial court failed to exercise its discretion and grant a motion for new trial as a result of its misapprehension of what the law governing the case is. (Tr. p. 235.)

4

The trial court assumed the function of a jury in passing upon the weight of the testimony offered at the hearing upon petitioner's motion for a new trial as against other evidence tending to show the guilt of petitioner.

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REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT:

1

The majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case (Tr. pp. 249-255), is in direct conflict with the opinion of this Court in *Cole vs. Arkansas*, 92 L. Ed., 429. (Advance Sheet No. 11, decided March 8th, 1948.)

2

That opinion is in direct contravention of the Fifth Amendment to the Constitution of the United States.

3

That opinion is in direct conflict with the opinion of another Circuit as decided in *Cleary vs. United States*, 163 F. (2), 748.

4

In holding that a man may be indicted and tried for having failed to register for selective service on a date fixed at which men between the ages of 19 and 45 should register, but could be convicted under the same indictment if he were over 45, but under 65, the Circuit Court of

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Appeals in this case has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

5

In sustaining the trial court's opinion in this case that a man might be indicted for having failed to register on February 16th, 1942, for selective training and service, which date was fixed for those between 19 and 45 to register, he, nevertheless, could be convicted if the proof showed he was over 45 years of age if it be further proven that he was under 65, the United States Circuit Court of Appeals decided an important federal question, which has not been, but should be, passed upon by this Court.

No. 1

Petitioner introduced at the hearing upon his motion for new trial certified copy of the record of his entry into the United States, which showed he was 20 years of age June 30th, 1913. (Tr. p. 31.) He introduced certified copy of his registration certificate where he registered for selective service for World War I, showing he was 23 years old June 5th, 1917. (Tr. p. 233.) These two exhibits clearly showed that he was at least 48 years of age February 16th, 1942. The Government proved at the trial of this

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case on its merits there was no such record of his entry existing. (Tr. p. 77.) Although the Government had it in its possession all the while, yet the trial court held that it was not newly discovered evidence. (Tr. p. 237.) Although the trial court allowed present counsel to stipulate what Emil Corenbleth, petitioner's counsel at his trial on its merits, would testify, instead of having him appear as a witness, and the testimony was that Corenbleth knew nothing of the existence of petitioner's registration for selective service for World War I (Tr. p. 234), yet the trial court held it was not newly discovered evidence (Tr. p. 237), when there was no evidence whatever to the contrary.

No. 2

It is inconceivable that had petitioner been given a new trial and produced the documentary evidence he produced at the hearing upon his motion for a new trial he would again be found guilty under the indictment under which he was tried. It is the well settled rule that if the evidence produced as newly discovered, and is actually such, upon a motion for a new trial, is of such substantial nature as would likely produce a different result at another trial, it is an abuse of discretion to overrule such motion.

No. 3

The failure to properly exercise discretion is an abuse of discretion. The trial court actually held that petitioner

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was 20 years of age June 30th, 1913, which would make him more than 48 years of age on February 16th, 1942 (Tr. p. 237), yet he stated that under the indictment as brought, petitioner could be again tried and convicted even if he were over 45 years of age if it be proven that he was under 65. (Tr. p. 237.) The trial court also conceded that petitioner was 23 years of age June 5th, 1917, at the time he registered for selective service for World War I (Tr. p. 235), yet he held this immaterial. The trial court found that petitioner was "considerably confused about how old he is" (Tr. p. 235), and a government witness, Alton Bryant, an agent of the Federal Bureau of Investigation, testified that petitioner told him he did not know how old he was (Tr. p. 81), yet the trial court resolved the doubt in favor of the Government's theory of the case.

No. 4

At the hearing upon petitioner's motion for a new trial, the trial court allowed the government to introduce a number of applications for life insurance, in which petitioner stated he was born July 10th, 1898 (Tr. pp. 121-227), which, if true, would make him under 45 years of age on February 16th, 1942. The trial court assumed the function of a jury and passed upon the weight of this testimony offered by the Government as against that offered by

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petitioner, and disregarded what effect the newly discovered evidence might have at another trial. (See Cleary vs. United States, 163 F. (2), 748.)

CONCLUSION

1. Under Presidential Proclamation No. 2535 (50 U.S.C.A., Appendix Paragraph 302, note), February 16th, 1942, was fixed as the date on which all men between the ages of 19 and 45 should register. Men in no other bracket were required to register until Presidential Proclamation No. 2541 (50 U.S.C.A., supra), issued March 19th, 1942, fixed the date of April 27th, 1942, on which all men between the ages of 18 and 65 should register. Petitioner was indicted for having failed to register on February 16th, 1942, "*and the said defendant being then and there such a person who was bounden under the provisions and requirements of said Act, Rules, Orders and Regulations to so register* * * *." The trial court held petitioner was over 45 years of age on February 16th, 1942, but it was immaterial if he were under 65. The majority opinion of the Circuit Court (Tr. p. 252), virtually upholds this view of the law. Petitioner earnestly urges that such a view of the law is so sharply in contrast with the opinion of this Court in *Cole vs. Arkansas*, supra, as to require the reversal of this case.

2. If the trial court and the majority of the Circuit Court of Appeals hold this opinion of the law, petitioner contends that all of them abused their respective discre-

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tions in failing to give him the relief sought, because, it is improbable that they, under such circumstances, could fairly pass upon the issues involved.

3. If petitioner were actually over 45 years of age on February 16th, 1942, it was an abuse of the sound discretion of the trial court, and sanctioned by the Circuit Court of Appeals, to overrule petitioner's motion for a new trial, timely brought under Rule 33 of Federal Rules of Criminal Procedure, regardless of other requirements they hint are lacking. There is always a sound legal remedy to prevent injustices as long as courts have jurisdiction. Those courts did have; this Court now has.

WHEREFORE, petitioner prays that the writ of certiorari issue; that the cause be reviewed by this Court, and that the judgment of the trial court and the Circuit Court of Appeals be reversed.

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Dallas, Texas
Attorney for Petitioner.

.....

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Of Counsel.

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No.———

IN THE

Supreme Court of the United States

SAM HANNA FOGEL, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

SUPPORTING BRIEF

To the Honorable, The Supreme Court of the United States:

1

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit appears in the Transcript of the Record (Tr. pp. 249-259).

JURISDICTION

Jurisdiction is invoked under Section 240 (a) of the Judicial Code (28 U.S.C.A., Section 347-a). The original opinion of the Circuit Court of Appeals was filed on May 7th, 1948.

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Petition for rehearing was filed on May 21st, 1948, and overruled on May 28th, 1948.

STATEMENT OF THE CASE

We adopt the statement made in the foregoing petition for certiorari as a part of the statement of the case and, to save repetition, do not restate it here. If further statements are deemed appropriate to the argument, they will, accordingly, be made.

SPECIFICATION OF ERRORS

1

Petitioner was indicted for having failed to register for selective training and service on February 16th, 1942. Under Presidential Proclamation No. 2535, no persons other than men between 19 and 45 were required to register on that date. It was not until Presidential Proclamation No. 2541 went into effect, fixing the date of April 27th, 1942, on which men between 18 and 65 should register, that others than the first class were required to register. Petitioner was indicted as being one of the first class and was so tried and so found guilty. All the proof the Government offered was in an attempt to prove Petitioner was under 45 on February 16th, 1942. It was not until petitioner filed his motion for new trial under Rule 33 of Federal Rules of Criminal procedure for the District

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Courts of the United States that the question arose and was urged by the Government and sustained by the trial Court and upheld by the Circuit Court of Appeals that petitioner would be guilty, even if he were over 45 years of age, if he were under 65.

Petitioner, therefore, urges that to indict him for one offense and convict him of another, of which he was neither indicted nor tried is such error, denounced by the Fifth Amendment to the Constitution of the United States and by this Court in *Cole vs. Arkansas*, 92 L. Ed., 429 (Advance Sheet No. 11, decided March 8th, 1948), as to require a review by this Court and a reversal of the trial court and the United States Circuit Court of Appeals for the Fifth Circuit.

2

At the trial of this cause on its merits, Glenn A. Torrence, naturalization examiner for the United States Immigration and Naturalization Service, a witness called by the Government, testified that a search had been made and there was no record existing of petitioner's entry into the United States, he being an alien and so registered. (Tr. pp. 77-78.)

At his hearing upon his motion for new trial brought under Rule 33, supra, petitioner presented and introduced into evidence certified copy of the record of his entry into

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the United States as reflected by the records of the United States Immigration and Naturalization Service at Philadelphia, the place Torrence testified had been searched and nothing found, which said record had been in possession of the United States authorities since his arrival, yet the Court held this was not newly discovered evidence (Tr. p. 237), and the Circuit Court of Appeals upheld this view, and further held petitioner was guilty of negligence by not having it at his trial. (Tr. pp. 249-255.)

Petitioner further produced and introduced into evidence at the hearing upon his motion for new trial certified copy of his registration for selective service for World War I, showing him to have been 23 years of age on June 5th, 1917 (Tr. p. 233), and the trial Court held, and was affirmed by the Circuit Court of Appeals, this was not newly discovered evidence, regardless of the fact that the trial court had allowed the stipulation that counsel for petitioner knew nothing of its existence, and did not know of the existence of the record of his entry into the United States. (Tr. p. 234.)

Petitioner, therefore, urges that such action on the part of the trial court, and its sanction by the Circuit Court of Appeals, is an abuse of discretion, constituting error of such substantial and harmful nature as to require a review by this Court and a reversal of the trial court and the Circuit Court of Appeals.

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3

As against the evidence offered by petitioner as above set out in Specification of Errors 1 and 2, the trial court allowed the Government to introduce evidence and documents signed by petitioner, tending to show he was born in 1898 (Tr. pp. 113-212), and the trial court proceeded to weigh this testimony as against that offered by the petitioner at the hearing upon his motion for new trial.

Petitioner, therefore, urges that, he having presented newly discovered evidence of substantial nature at a hearing upon his motion for a new trial, it was an abuse of discretion for the trial court to usurp the functions of a jury or a judge at another trial and weigh the testimony of the government against that offered by him, and constitutes error of such harmful and substantial nature as to require a review by this Court and a reversal of the trial court and the Circuit Court of Appeals.

ARGUMENT

Petitioner concedes that it was within the sound discretion of the trial court to grant or refuse to grant his motion for new trial, and the burden is upon him to show the trial cort abused such discretion in overruling his motion. There are two general ways such discretion may be abused, (1) to erroneously exercise it, or (2) to erroneously fail to exercise it. Petitioner earnestly urges the trial

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court committed both errors here and the Circuit Court of Appeals did likewise in sustaining the trial court. In holding the evidence produced by petitioner at the hearing upon his motion for new trial was not newly discovered, the trial court and Circuit Court of Appeals erroneously exercised and abused sound discretion. In holding that, although petitioner was over 45 years of age on February 16th, 1942, he could be convicted under the indictment in this case if he were under 65, the trial court and Circuit Court of Appeals failed to apply properly the law governing the case, and did, thereby, abuse the sound discretion that was theirs.

WAS THE EVIDENCE NEWLY DISCOVERED?

At the original trial of this cause, the government proved by its witness, Glenn A. Torrence, an examiner for the Immigration and Naturalization Service, that there was no record of the entry of petitioner into the United States, (Tr. p. 77), whereby his correct age might be proven by such documentary evidence. Petitioner subsequently found and produced it at the hearing upon his motion for new trial. (Tr. p. 31). Yet the trial court and Circuit Court of Appeals held it was not newly discovered, and the Circuit Court of Appeals went even further and held if it were newly discovered evidence, petitioner was guilty of negligence in not producing it at his original trail.

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Bearing upon whether this is newly discovered evidence within the meaining of such new trials, petitioner quotes with approval and adopts the following portion of the dissenting opinion of Judge Sibley rendered in this case in the Circuit Court of Appeals:

"As to the record evidence being newly discovered, of course Josef and Sam knew that Sam came to Philadelphia in 1913, and there ought to be a record of his entry. The Bureau of Immigration and Naturalization was asked for it and reported none could be found. It has since been found. How can the Government, which had the record all the while and said it did not exist, assert a want of diligence in producing it? It became available to Fogel only since the trial, and is newly discovered within the law of new trials. It strongly supports the testimony of Josef, the only living witness who knows the fact of Sam's age, and would likely produce a different result on another trial." (Tr. p. 258)

Petitioner contends that the position of the majority opinion of the Circuit Court of Appeals that the evidence is sharply conflicting as to whether the record of entry produced, (Tr. p. 31), is that of petitioner is error. Josef Fogel, (Tr. pp. 63-69), and Nathan Selcovits, (Tr. pp. 45-49), testified that Schloime Vogel and Sam Fogel are one and the same person. That was the same name "in the Old Country" as Sam Fogel is here. Josef is

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Sam's brother. Selcovits was raised in the same town with Sam and Josef and had known them always. Josef sent for Sam while he lived at 1613 Orkney Street, Philadelphia, Pennsylvania. The record introduced shows that is who sent for Schloime Vogel, and that was where he was going when he got to America. Josef and Selcovits testified that they were born in Roszyny, Russia, (now Poland) with Sam. That is where Schloime Vogel was born, as shown by the record. They testified that Sam's father was named Chaim Vogel, who lived at Rozyny, Russia. That was the father and place of his residence of Schloime Vogel as shown by the record. Josef testified, supra, that he and Sam were the only ones of his family ever to come to America. All the others were killed in World War I.

Sam was 20 years of age then. He was 53 at the time of his trial. Does the Government expect him to be the same size and appearance and look at 53 like he did at 20? The argument, we believe, that he is not one and the same person as Schloime Vogel is too weak to attract the attention of this Honorable Court. Of course Sam Vogel and Schloime Vogel is one and the same person. As a matter of fact, this Court judicially knows that "Vogel" in German is the same as "Fogel" in English. The Court judicially knows that "Schloime" is the Yiddish for Sam. Josef testified, supra, that his and Sam's mother's name

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was Hannah, and Sam adopted that as his middle name when he came to America.

The trial court held and found that Sam Fogel and Schloime Vogel was one and the same person, because he said: "Now, when this man came over here, he was a bright young fellow, twenty years of age. He showed his good judgment by coming right straight to Texas, and he went down here to Waxahachie where they raised good cotton." (Tr. p. 237) The trial court could have drawn this conclusion from no other source than the record of the entry of Schloime Vogel. Waxahachie, Texas, is the place Sam Hanna Fogel came to from Philadelphia. (Tr. pp. 14-30). The record of petitioner's entry into the United States is newly discovered evidence, and in view of the fact it was admitted and proved that Sam was confused about his age, this newly discovered evidence would most certainly produce a different result at another trial of this case. That is the test.

Petitioner contends that his Exhibit No. 4, (Tr. p. 233), the record of his having registered for selective service for World War I, is likewise newly discovered evidence. It appears for the first time at the hearing upon his motion for a new trial. (Tr. p. 256) The stipulation of Corenbleth's testimony, (Tr. p. 234), was that he new nothing of the existence of this document. Of course, this Court judicially knows that Corenbleth is an officer of the court

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where petitioner was tried, and was a reputable lawyer, otherwise he could not have appeared as counsel for petitioner. The Court further judicially knows that it is only on rare occasions that the trial courts put lawyers, admitted to practice therein, under oath. Present counsel knew and believed that Corenbleth's unsworn statement, dictated into the record, was to be given the same force and effect as would his sworn testimony if he had been there in person, otherwise, he would have moved for a continuance in order that his presence might be had.

The position of the Government and the Circuit Court of Appeals that petitioned was guilty of negligence by not having this testimony at his trial, petitioner believes, is without merit. It most certainly is in respect to the record found at the Port of Entry. The Government certainly cannot retain possession of documents, contend it does not exist, and when, despite the Government's action and contention, it is found, take the position it is nothing new and petitioner was negligent in not having it at his trial. We think it equally true of the record of Petitioner's registration for selective service at World War I. Corenbleth did not know of its existance. He was Fogel in so far as the conduct of that trial is concerned. If Corenbleth were guilty of negligence, which we most certainly contend he was not, can his client be held liable and compelled to pay a criminal penalty for it? It is not done

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that way in American Courts. Besides, there is no evidence against our position. If there are presumptions, they must be resolved in favor of petitioner, and not the Government.

Petitioner earnestly contends and believes that this Honorable Court had in mind injustices exactly like this here done petitioner when it adopted Rule 33 of Federal Rules of Criminal Procedure for the District Courts of the United States. There is no question but that the newly discovered evidence here produced proves that petitioner was more than 45 years of age on February 16th, 1942. That evidence was not available to him at his trial. Under the old rules it could not have been brought forward as it is here brought, and petitioner's only redress would have been to the pardoning powers. In the meantime, he would have languished in prison for probably the duration of his sentence, while his friends and counsel sought the ear of that pardoning power. This Rule gives the courts an adequate legal power to prevent these injustices, and when this power is not properly exercised by lower courts, it constitutes an abuse of discretion, which should be reviewed by this Court. If ever there were a case where the provisions of this Rule should be invoked, it is this one.

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WAS PETITIONER MORE THAN 45 YEARS OF AGE ON FEBRUARY 16th, 1942? AND IF HE WAS, COULD HE BE LEGALLY CONVICTED UNDER THE INDICTMENT BROUGHT IN THIS CASE?

At the trial of this case, the only evidence the Government had was the statements petitioner made in connection with his registration as an alien, and his petition for natuarlization, in which he stated that he was born July 10th, 1898. (Tr. pp. 72-79) A Government witness, Alton Bryant, a Federal Bureau of Investigation Agent, testified while examining petitioner in the course of his duty as such agent, petitioner stated that did not know his exact age. (Tr. p. 81) The trial Court held and found at time of his orginal conviction, (Tr. p. 255), and at the time he overruled his motion for new trial, (Tr. p. 235), that "The defendant, Sam Fogel, seems considerably confused about how old he is." Then we are forced to the conclusion that the only effect the Government's proof had upon the trial court was to create "a considerable confusion about how old he is."

On the other hand, the proof offered by petitioner at the hearing upon his motion for new trial is positive. He, according to the Government's records, was 20 years of age June 30th, 1913, and according to the records, would have been 21, July 10th, 1913, and 49 years of age February 16th, 1942. He was 23 years of age June 5th, 1917,

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making him 48, February 16th, 1942, but 49 July 10th, 1942. These records, made years ago and before petitioner ever applied for life insurance, tally exactly, and show, we believe, beyond doubt, that petitioner was over 45 on February 16th, 1942. The trial court found and held in its oral opinion at the conclusion of his hearing upon the motion for new trial that he was 20 years of age June 30th, 1913, and 23 years of age June 5th, 1917, when he said: "Now, when this man came over here, he was a bright young fellow, twenty years of age. He showed his good judgment by coming right straight to Texas, and he went down here to Waxahachie where they raised good cotton." (Tr. p. 237.) Petitioner urges that the trial court so having found from the evidence presented at the hearing upon his motion for new trial that he was 20 years of age, June 30th, 1913, making him 49 on February 16th, 1942, it was an abuse of sound discretion not to set aside the verdict and give him a new trial. American Jurisprudence, Vol. 14, Page 279; *Cleary vs. United States*, 163 F. (2), 748; *United States vs. Socony Vacuum Oil Co.*, 310 U. S., 257, 84 L. Ed., 1181; *Cole vs. Arkansas*, 92 L. Ed., 429 (Advance Sheet No. 11, decided March 8th, 1948); *Fogel vs. United States*, 162 F. (2) 54; *Langreen vs. United States*, 282 U. S., 530, 75 L. Ed., 520, 51 Sup. Ct., 243; *Mattox vs. U. S.*, 146 U. S., 140.

Petitioner believes the language of the indictment upon which he was convicted is so important to the petition here

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presented that it should here be repeated. Omitting the formal parts, it charges that petitioner *on February 16th*, 1942, "* * * did, unlawfully, wilfully, and feloniously, with intent to evade induction into the land or naval forces of the United States of America, fail and neglect to register with a Selective Service Draft Board, which said act and failure to act on the part of the said defendant, as aforesaid, were in violation of the Act of Congress of the said United States, approved September 16th, 1940, as amended, and the Rules, Orders and Regulations issued and promulgated by virtue of and in pursuance thereto, *and the said defendant was then and there such a person who was bounden under the provisions and requirements of said Act, Rules, Orders and Regulations to so register as is required by the provisions of the said Act and the said Rules, Orders, and Regulations.*"

Presidential Proclamation No. 2535 (50 U.S.C.A., Appendix Paragraph 302, Note) fixed the date of February 16th, 1942, as the day all male persons between the ages of 19 and 45 should register. The Act or Statute was inoperative until put into effect by such Presidential Proclamation. It follows, of course, that if petitioner were over 45 years of age on February 16th, 1942, he was not required and was under no obligation to register. Indeed, had he tried to register on that date and had given his correct age of 49, he would not have been permitted to register. But the indictment charged that he was then and

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there (on February 16th, 1942) such a person who was required to register on that date. It was not until April 27th, 1942, that Presidential Proclamation No. 2541 (50 U.S.C.A., supra) directed that another class, to-wit, all male persons between the ages of 18 and 65 should register. Petitioner was not charged with this violation.

Petitioner says that the able dissenting opinion of Judge Sibley (Tr. p. 255), so nearly states his position in this case he quotes and adopts this portion of it as his: "The indictment, filed January 22nd, 1947, charges the failure to register 'on or about the 16th day of February, 1942.' That is the date on which by Presidential Proclamation persons between 18 and 45 years of age were required to register. Fogel was tried for failing to register on that date, being under 45. The whole controversy in the trial was whether he was under 45 or over 45. The judge in finding him guilty said: 'In this case, as to the matter of age, the defendant on oath fixes his age (in applying for citizenship) as of July 10th, 1898. In the light of the record we are of opinion that this should be accepted as true. * * * We think that it correctly fixes the age of defendant.' He thereupon found him guilty."

No question or intimation ever arose during the trial of this case in the trial court nor in the Circuit Court of Appeals (*Fogel vs. United States*, 162 F. (2), 54) that Fogel had ever been indicted or was being tried for any

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offense, other than he was under the age of 45 on February 16th, 1942, and failed and refused to register. In passing upon his appeal and upon his contention that he was over 45 years of age on February 16th, 1942, said Circuit Court of Appeals in *Fogel vs. United States*, supra, at pages 55-56, said:

"There is no merit in the contention that the evidence was insufficient to show that Fogel was within the age group subject to registration. The evidence shows that on or about February 7th, 1946, Fogel, an alien, appeared for a hearing in the office of the Naturalization Examiner at Dallas, Texas, on his application for registration as an alien. At that time he stated under oath that he was born in Poland on July 10th, 1898. Again on September 12th, 1946, Fogel was in the office of the Naturalization Examiner in Dallas and a number of questions were propounded. Each question was read to him and he again answered under oath, stating that he had been born on July 10th, 1898.

"Fogel did not take the stand in his own behalf. His brother, Joseph Fogel, said he had been instrumental in bringing Samuel to this country in 1913. (Immigration officers, however, were unable to find when and where Samuel entered this country.) Joseph further testified that Samuel was much older than the age he had given to the Naturalization Examiner. Joseph admitted that he had

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left Poland, which was under the domination of Russia, to escape military service, and his evidence was misleading and evasive in many respects.

"(3, 4) The evidence was sufficient to establish appellant's age as being within the age group subject to registration on February 16th, 1942. Appellant was born in Poland, and his parents were dead. Certainly, birth records were not available. The next best evidence was his own statement made under oath to the Naturalization Examiner. The statements were in no wise confessions or admissions of guilt of the offense charged in the indictment. When these statements were made, no indictment had been returned. The statements were not made in relation to this prosecution, but were voluntarily made and sworn to by Appellant at a time when he sought to obtain protection and privileges of citizenship in this country, while he was at the same time wilfully failing and neglecting to register to serve it in its struggle for survival. *The evidence warranted a finding that Fogel's age was below 45 years on the day fixed for registration.*" (Italics ours.)

However, when petitioner made the showing at the hearing upon his motion for a new trial, the trial court changed its attitude both with reference to what the law was and for what Fogel was being tried. In overruling petitioner's motion for a new trial, the trial court said:

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"We do not believe the evidence, so far as the defendant is concerned, is newly discovered. For that reason, we do not feel that the case should be set aside. But, if we were to concede that it was newly discovered evidence, and that his birth date was back in 1894, instead of 1898, under the law, as pointed out by the District Attorney, it would still have been his duty to have registered, and we believe that he could be put on trial again, if we granted a new trial, under the indictment, as it now exists." (Tr. p. 237.)

The Circuit Court of Appeals also changed its position as to the law governing this case when the appeal from the overruling of petitioner's motion for a new trial reached it. In its opinion affirming the action of the court below that court said: "It is without dispute that Appellant not only failed to register for Selective Service on February 16th, 1942, the date set by Presidential Proclamation for the registration of all males between the ages of 19 and 45, but that he further failed to register on and after April 27th, 1942, the date set by second Presidential Proclamation for the registration of all males between the ages of 19 and 65. There is no dispute that Appellant is under 65 years of age."

It is our contention that if Appellant were over the age of 45 on February 16th, 1942, he would not be guilty of the offense charged in this indictment. He was never charged nor tried for having failed to register on April

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27th, 1942, the date set for all males to register who were over 45 years of age. It is the Congress, not the Court, which defines a crime and ordains its punishment. Every criminal charge must have a clear legislative basis. There are no constructive offenses and before one can be punished, it must be shown that the case is plainly within the statute.

There is no question in our mind that failure to register on February 16th, 1942, is one offense, and failure to register on April 27th, 1942 is another offense, and that they are separate and distinct offenses. In *Cole vs. Arkanas*, supra, the petitioners applied to this Court for certiorari because their convictions were affirmed in the court below under a criminal statute for violation of which they had not been charged. This Court held in that case that it was in violation of due process to charge one with one crime and convict him for another. In so holding this court said:" No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." This court further held in that case:" It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to

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convict him upon a charge that was never made." That was done to us.

In overruling petitioner's motion for a new trial, he was denied due process as guaranteed by the Fifth Amendment to he Constitution of the United States and in violation of decision of this court as announced in *Cole vs. Arkansas*, supra; *Re Oliver vs. U. S.* 68 S. Ct.,———, decided March 8th, 1948; *DeJonge vs. Oregan*, 299 U. S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct.; *Frank vs. Mangum*, 237 U. S. 309, 327, 59 L. Ed. 969, 980, 35 S. Ct., 582; *Cf. Mooney vs. Holohan*, 294 U. S. 103, 113, 79 L. Ed. 791, 794, 55 S. Ct., 340, 98 A.L.R. 406.

CONCLUSION

The action of the trial court in overruling petitioner's motion for a new trial and the opinion of the Circuit Court of Appeals in affirming the trial court was an abuse of sound discretion, requiring a review by this Court, and a reversal of those courts, because:

1. Charging petitioner with one offense and convicting him of another was in violation of due process.

2. Failure of the trial court to construe the law in connection with the facts proven in the hearing upon his motion for a new trial, and the action of the Circuit Court of Appeals in affirming such procedure are contrary to the opinions of this Court and of other Circuits.

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3. The opinion of the Circuit Court of Appeals for the Fifth Circuit, affirming the trial court's actions above complained of, is such a departure from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

The petition should ge granted and the case reversed, for which we respectfully pray.

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